

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
THE CITY OF HUNTINGTON,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01362
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

	x	
	:	
CABELL COUNTY COMMISSION,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01665
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

BENCH TRIAL - VOLUME 10
BEFORE THE HONORABLE DAVID A. FABER, SENIOR STATUS JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

MAY 14, 2021

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1 PROCEEDINGS had before The Honorable David A. Faber,
2 Senior Status Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 May 14, 2021, at 9:00 a.m., as follows:

5 THE COURT: Good morning, everybody.

6 SIMULTANEOUS SPEAKERS: Good morning, Your Honor.

7 THE COURT: TGIF.

8 Mr. Farrell, are you ready to call your next witness?

9 MR. PIFKO: Good morning, Your Honor. Mark Pifko
10 for plaintiffs.

11 Plaintiffs call David May to the stand.

12 THE COURT: Okay.

13 MS. MCCLURE: Your Honor, before David May comes
14 up to the stand to testify, I have something preliminary to
15 raise with the Court.

16 Your Honor, Mr. David May is presently the Senior Vice
17 President of Diversion Control at AmerisourceBergen. He has
18 primary responsibility for overseeing the currently enforced
19 Diversion Control Program. During Mr. May's examination, we
20 anticipate that we will both present customer-specific
21 information regarding current -- current customers or former
22 customers of AmerisourceBergen and describe with some
23 particularity the way today our Diversion Control Program
24 works.

25 To that end, we note that it is contrary to the

1 purposes of that Diversion Control Program to have certain
2 of the pieces of information public.

3 We also recognize the right of the public and the media
4 to have access to trials. That said, we have some concerns
5 about certain particular documents being broadcast to the
6 overflow room for this portion of the trial and, to be
7 clear, not all of the documents, certain particular
8 documents.

9 So, in light of the sensitive information that will
10 potentially be discussed today, possibly elicited by Mr.
11 Pifko, possibly elicited by myself, and acknowledging the
12 need, of course, for us to present a defense in this case
13 but also trying to have the trial proceed efficiently, we
14 have the following proposal:

15 That David May testify in open court; that the
16 testimony be broadcast to the overflow room; that the visual
17 feed that focuses on the documents in the bottom right
18 corner of the overflow room be halted either for today or
19 for only the specific documents about which there are
20 confidentiality issues.

21 We also request that we be able to, subsequent to
22 today's testimony, either the documents or the testimony
23 itself, review for any particular redactions, which would be
24 accompanied by a motion by AmerisourceBergen.

25 It is possible that none of this would be necessary,

1 but in light of the fact that we are putting our witness --
2 their witness -- I'm sorry -- our witness in their case, we
3 simply don't know the scope and extent to which current
4 information would be discussed.

5 So, we have discussed this proposal with the plaintiffs
6 and my understanding is that they do not agree that we could
7 make specific requests for the documents not to be broadcast
8 to the overflow room or request sealing of specific portions
9 of testimony or specific documents subsequent to today's
10 testimony.

11 THE COURT: Do we have the ability to do this? We
12 do?

13 Okay. Mr. Farrell?

14 MR. FARRELL: Thank you, Judge. On behalf of the
15 plaintiffs, we object to -- this is open court and we object
16 to the sealing of any document or any testimony in a public
17 nuisance case brought on behalf of the public to abate this
18 epidemic. That's point number one.

19 Point number two, we don't know what documents they're
20 referencing because the Court has not required the
21 defendants to disclose what documents they're going to use
22 with these witnesses.

23 Number three, discovery in this case was blocked -- not
24 blocked. That's the wrong word. There's a temporal scope
25 to discovery in this case. On the back end, it was 2006 and

1 I believe on the front end, it was as of time of remand
2 sometime in 2019. So, for purposes of discovery
3 disclosures, we have not conducted any discovery nor been
4 permitted to conduct any discovery on the current scope of
5 their program.

6 And, finally, on the relevance standpoint, eliciting
7 testimony about current customers or current OMP programs,
8 we fail to see how it has anything to do with the flood of
9 pills that were sold into West Virginia, into this
10 community, giving rise to the opioid epidemic.

11 MS. MCCLURE: May I respond? Your Honor, certain
12 of the documents that I'm thinking of today would be
13 documents that have been produced to plaintiffs that are in
14 the record covered by the discovery period, which ends, I
15 honestly don't recall, sometime 2018 or 2019.

16 That said, some of the information within those
17 documents, despite the fact that it may be from 2018, would
18 still today be considered confidential by the company. And,
19 to be clear, this is confidential because the purpose of the
20 Diversion Control Program is, in fact, to protect the
21 public.

22 The second point that Mr. Farrell was making regarding
23 relevance, the plaintiffs have articulated in this case that
24 they are seeking an abatement-only forward-looking remedy.

25 So, Mr. May's testimony today, Mr. Farrell is free to

1 stand up and object to the extent that he believes that the
2 testimony is information that he was -- I believe he used
3 the word prevented from obtaining in the course of
4 discovery, but Mr. May is the present -- the present -- the
5 Vice President of Diversion Control. The plaintiffs are
6 seeking a forward-only abatement remedy and the current
7 state of the program, regardless of whether the plaintiffs
8 are choosing to focus in their examination on far distant
9 past and the fact that, what they call the number of pills
10 that were submitted long ago, the fact that they're choosing
11 to focus on that does not prevent us from pointing out to
12 Your Honor what is our Diversion Control Program today.

13 They're calling this witness, Mr. May. He currently
14 operates the Diversion Control Program. We're entitled to
15 mount a defense to that.

16 But, to be clear, the documents that I'm talking about
17 showing or potentially broadcasting and would have
18 confidentiality concerns are documents that the plaintiffs
19 have.

20 THE COURT: Let me make sure I understand you.
21 You're saying this is confidential customer information that
22 shouldn't be disclosed?

23 MS. MCCLURE: So it's not necessarily information
24 of the customer. It is in the sense that we have -- let me
25 give you an example -- parameters that are set for each

1 customer via a computer algorithm. Certain of the documents
2 that Mr. May may discuss today would contain those
3 customer-specific parameters. So, it's not necessarily the
4 customers' information. It's the perimeter and our
5 algorithm that assigns the amount a customer is permitted to
6 purchase prior to an order being flagged or considered an
7 order of interest by our system. So, it's our own
8 proprietary information regarding what a customer,
9 particular customers, are permitted to order prior to their
10 order being considered an order of interest.

11 THE COURT: Mr. Farrell?

12 MR. FARRELL: Judge, we have asked for in
13 discovery for the past three years the algorithm used by the
14 defendants to determine what is flagged under their system
15 and they have yet to produce it. We would strenuously
16 object to the late-hour introduction of the actual
17 algorithm. If Your Honor lets the algorithm, the code be
18 entered, then we would ask the opportunity to have Dr.
19 McCann run their algorithm on their own data.

20 MS. MCCLURE: And, Your Honor, I am not the
21 Diversion Control expert. I'm the lawyer here. So, the
22 first point is that to the extent that Mr. Farrell has a
23 complaint about apparently a long-standing concern he has
24 about discovery, this is not the forum in which to raise it
25 and such issues would have and should have been brought to

1 the Court long ago.

2 Second of all, I believe that Mr. May -- we're not
3 talking -- let me just be clear. I am not talking about the
4 introduction of an algorithm. What I am talking about is
5 documents which on their face would reveal information about
6 the maximum amount a customer would be permitted to order
7 using various parameters prior to their order being
8 considered an order of interest.

9 It's not in the public's interest in terms of the whole
10 purpose of the Closed System of Distribution to have these
11 particular pieces of information become public. Again, this
12 is a limited set of documents that have been produced to the
13 plaintiff.

14 THE COURT: So, you're saying that it's okay to
15 display them here in court, but you don't want them
16 broadcast in the overflow room; is that right?

17 MS. MCCLURE: Yes, Your Honor. My understanding
18 is that all of the attorneys who are here today are subject
19 to the Court's confidentiality order in this case and have
20 executed a protective order, et cetera.

21 THE COURT: Well, if we have the technological
22 ability to do this, I'm going to allow you to do it. So,
23 you tell me when the documents you're concerned about come
24 up and --

25 MS. MCCLURE: Thank you, Your Honor.

1 THE COURT: I'll have them cut off the broadcast
2 to the outside world.

3 MS. MCCLURE: Thank you, Your Honor.

4 THE COURT: Okay, Mr. Farrell.

5 MR. FARRELL: Just note for the record our
6 continuing objection to closure.

7 MR. PIFKO: Start this again. Good morning, Your
8 Honor. Mark Pifko for plaintiffs.

9 Plaintiffs call David May to the stand.

10 COURTROOM DEPUTY CLERK: Would you please state
11 your name?

12 THE WITNESS: David May.

13 COURTROOM DEPUTY CLERK: Thank you. Please raise
14 your right hand.

15 **DAVID MAY, PLAINTIFF WITNESS, SWORN**

16 COURTROOM DEPUTY CLERK: Thank you. Please take a
17 seat.

18 THE COURT: Sir, if you don't mind pulling your
19 mask down, that will help me to understand you.

20 THE WITNESS: Yes, sir. Good morning, Judge.

21 THE COURT: Good morning.

22 **DIRECT EXAMINATION**

23 **BY MR. PIFKO:**

24 **Q.** Good morning, Mr. May.

25 **A.** Good morning, Mr. Pifko.

1 Q. Will you please state your name for the Court?

2 A. David P. May.

3 Q. Are you currently identified with AmerisourceBergen?

4 A. I am currently employed with AmerisourceBergen, yes.

5 Q. And what is your title?

6 A. Vice President of Diversion Control and Security.

7 Q. You were previously deposed in the MDL and you sat as a
8 30(b)(6) corporate representative for AmerisourceBergen,
9 correct?

10 A. Yes.

11 Q. What are your responsibilities as Vice President of
12 Diversion Control?

13 A. My responsibilities include oversight of the Order
14 Monitoring Program, which is part of the Diversion Control
15 Program, at ABC. It also includes oversight of our due
16 diligence activities, again, as part of the diversion
17 control and I would include there new customer due diligence
18 and ongoing customer due diligence.

19 It also includes the security profile. We have
20 distribution centers across the country where some of my
21 team engages in the work around the security at those
22 facilities, as well as at some of our corporate buildings.

23 I also have investigative staff that work for me and
24 they investigate such things as hotline complaints or they
25 may investigate losses at our distribution center if they

1 occur.

2 **Q.** You joined the company around 2014, correct?

3 **A.** March of 2014, yes.

4 **Q.** You had -- you had another title. You were Senior
5 Director of Regulatory Affairs at that point?

6 **A.** The title when I joined the company was Senior Director
7 of Diversion Control and Federal Investigations.

8 **Q.** Okay. Were your responsibilities at that time roughly
9 the same as they are now, although you had a different
10 title?

11 **A.** Generally, yes, around Diversion Control. What was
12 added to my responsibilities was more of that security and
13 investigations profile.

14 **Q.** Okay. So, initially, you weren't responsible for the
15 security investigations portion of it?

16 **A.** To the extent that investigations of losses would be
17 brought to my attention as part of Diversion Control, but
18 more of those duties in direct oversight of those employees,
19 you know, were added to my function.

20 **Q.** Prior to joining AmerisourceBergen, you currently (sic)
21 serve with the DEA, correct?

22 **A.** Yes, prior to joining, I did.

23 **Q.** Okay. For approximately how long?

24 **A.** I joined the Drug Enforcement Administration in 1982 as
25 a student intern. Worked for them for three years or so,

1 graduated from Northeastern University in 1985, and then had
2 about a 30-year career with DEA.

3 **Q.** And working for AmerisourceBergen, that was your first
4 job in the public sector; is that correct?

5 **A.** That is correct.

6 MS. MCCLURE: Objection.

7 BY MR. PIFKO:

8 **Q.** When you joined --

9 MS. MCCLURE: Objection to foundation, public
10 sector.

11 BY MR. PIFKO:

12 **Q.** When you joined --

13 THE COURT: Wait a minute.

14 MS. MCCLURE: Your Honor, it was just he said
15 public sector. I believe he meant private sector.

16 THE COURT: Oh, okay. All right.

17 Did you mean private sector?

18 MR. PIFKO: I did. Sorry.

19 **Q.** When you joined AmerisourceBergen -- let me back up for
20 a second. Who do you report to?

21 **A.** Chris Zimmerman.

22 **Q.** Okay. And you said you have a team under you, correct?

23 **A.** Correct.

24 **Q.** About how many people report to you?

25 **A.** Well, there are about 30 people on my team. I have

1 five direct reports.

2 **Q.** Okay. And since the time that you joined the company,
3 you've always reported to Mr. Zimmerman?

4 **A.** That's correct.

5 **Q.** So, when you joined the company, was your position a
6 new position or did you take over someone else's position?

7 **A.** It was a new position, my understanding.

8 **Q.** So, when you first met with Mr. Zimmerman either in
9 your interview or when you took over the position, did you
10 attempt to gain an understanding of what would be expected
11 of you in this position?

12 **A.** Yes. We had discussions about what the position would
13 entail.

14 **Q.** Did you gain an understanding of why they were adding
15 this new position?

16 **A.** My understanding is that they needed an additional
17 resource.

18 **Q.** Was there something specific they wanted you to focus
19 on? Did you have an understanding about why they wanted
20 this additional resource?

21 MS. MCCLURE: Objection, compound.

22 THE COURT: Sustained. Break it up, Mr. Pifko.

23 BY MR. PIFKO:

24 **Q.** Did you have an understanding about why the company
25 wanted to add this additional resource?

1 **A.** The why, not really.

2 **Q.** Prior or around the time you joined the company, did
3 you undertake any efforts to understand the regulatory
4 activities that were going on in the distribution industry?

5 **A.** So, prior to joining the company and during this time,
6 before I was employed, I reviewed the various regulations
7 that were involved with the pharmaceutical industry as a
8 whole and supply chain, as well as the closed system. I did
9 further research when I was hired by the company into, you
10 know, how the company actually carried out those
11 responsibilities.

12 **Q.** Were you aware at the time that some entities in the
13 distribution entity had had regulatory compliance
14 enforcement activities brought against them?

15 **A.** So, when I joined the company in 2014, you know, there
16 were periods of time where I did various presentations and
17 trainings and I've learned about certain actions that have
18 been taken by DEA specifically.

19 **Q.** Were you aware at the time that Cardinal Health had had
20 its registration suspended at its Lakeland facility around
21 2012?

22 MR. RUBY: Objection, Your Honor. Foundation as to
23 Cardinal Health.

24 THE COURT: Sustained. If you can lay a
25 foundation, you can ask him.

1 BY MR. PIFKO:

2 **Q.** In taking on this position, did you believe it was
3 necessary to understand the nature of DEA's prior
4 enforcement activities against other drug distributors in
5 the industry?

6 **A.** As I took the position, you know, I think it was
7 important to understand as much as I could about the
8 industry, about the regulations, about the participants in
9 the industry. I'm not sure I had any particular focus on
10 any particular area. It was more kind of drinking from the
11 fire hose trying to gather as much information as I could.

12 **Q.** And, in gathering that information, did you attempt to
13 make yourself aware of enforcement actions against other
14 major entities in the supply chain?

15 **A.** So, among the materials that I reviewed, I seem to
16 recall that I became aware of certain actions that were
17 taken, but I don't have any specific -- sitting here in
18 2021, you know, what I did know specifically in 2014 around
19 what I didn't know.

20 **Q.** So, on or around the time that you joined
21 AmerisourceBergen, did Mr. Zimmerman make you aware of any
22 problems that the company was facing that he wanted you to
23 specifically focus on?

24 **A.** I don't know that there were any particular problems
25 that he identified. I think we had a lot of discussion

1 about, you know, the state of play, in essence. You know,
2 what was going on in the industry, what was the relationship
3 with the regulator. You know, what were some of their
4 challenges and, you know, and then, you know, discussing in
5 general how they were doing things. And those conversations
6 included more than Mr. Zimmerman. The people that were
7 doing the work, I would engage with them, as well.

8 **Q.** Who else did you speak to about those issues?

9 **A.** Other folks at the company, NCSRA, Corporate Security
10 and Regulatory Affairs. You know, that would have included
11 Steve Mays, who had been there for sometime; Ed Hazewski,
12 who was, at the time, I believe his title was Director of
13 Diversion Control, and he was directly overseeing the
14 day-to-day order monitoring and due diligence efforts. And
15 then the various team members who were actually engaged in
16 the work, I would speak with them, as well.

17 **Q.** I believe you said that Mr. Zimmerman and these other
18 people that you just mentioned, you discussed challenges in
19 the regulatory environment; is that what you said?

20 **A.** Yes. Yes.

21 **Q.** Okay. What do you mean by -- can you elaborate? What
22 kind of challenges did you discuss with Mr. Zimmerman?

23 **A.** I think, just generally speaking, trying to understand
24 the regulators' expectations particularly around suspicious
25 order monitoring and reporting. That seemed to be an area

1 where it wasn't completely clear to the team, you know, what
2 specifically was required and some frustrations by the team
3 in terms of communicating with the regulator on some of
4 those issues.

5 **Q.** Did you understand that part of why they brought you on
6 was to add clarity to that issue?

7 MS. MCCLURE: Objection, calls for speculation.

8 THE COURT: Overruled. He can answer.

9 THE WITNESS: Again, the intent of Mr. Zimmerman
10 and AmerisourceBergen in hiring me, as I sit here today, can
11 I describe precisely what their intent was? I really can't.
12 I know that, you know, what we discussed and what were some
13 of the expectations and, you know, we talked about some of
14 the things that I thought I could help with.

15 BY MR. PIFKO:

16 **Q.** And let's break that out a little bit. So, you said
17 there were things you could help with and you said there
18 were expectations. So, what did you understand the
19 expectations were of you when you joined the company?

20 **A.** That I would, you know, take oversight responsibility
21 for this particular program and the Diversion Control
22 Program and all that it encompasses and, you know, evaluate
23 the program and, you know, bring my view to what I thought
24 of the program and, you know, any areas where I thought
25 maybe we could make some changes. So, that's, generally

1 speaking, what some of those expectations were.

2 **Q.** And then you said there were areas where you thought
3 you could help. What -- how did you think you could help
4 address those expectations?

5 **A.** So, I think that, you know, if one of the issues is
6 communication with DEA and trying to understand DEA, I think
7 that, you know, as an entity, DEA has, I would say, a
8 personality to it. And so, I, as, you know, a 30-year
9 employee of the Drug Enforcement Administration, I
10 understand the personality and that can sometimes make
11 things easier when it comes to communication and also kind
12 of anticipating, you know, which way the agency might be
13 thinking on certain topics. And so, I think, you know, that
14 was one of the things that I could help with.

15 I also -- you know, the company, AmerisourceBergen, has
16 a fairly large international presence and I had spent around
17 ten years in my career with DEA working in Europe, Africa
18 and Belize and I think that they thought that that
19 experience could also be helpful to them with their
20 international footprint, but that was some of the earlier
21 discussions and the fact of the matter, I have not done too
22 much of that work. I have done some.

23 **Q.** Did you have relationships with high-ranking DEA
24 officials as a result of your experience that you thought
25 you might be able to call upon to assist the company at

1 times?

2 **A.** I'm sorry, Mr. Pifko. I missed the very first part of
3 that question.

4 **Q.** Sorry. I said did you have relationships with
5 high-ranking DEA officials from your work at DEA that you
6 thought you could help use to execute your duties in meeting
7 the expectations of Mr. Zimmerman?

8 **A.** Well, I certainly had relationships with folks at DEA
9 that had senior positions towards the end of my career. I
10 guess my caution is, as you've asked the question, it almost
11 sounds like, you know, could I leverage some of those
12 relationships in some way and, you know, that would be
13 inappropriate and absolutely never. I think that having
14 those relationships and having the ability to communicate
15 with DEA is important and I wish we could do more of it.

16 **Q.** You mentioned some names and people that you spoke to
17 when you initially took on the job. So, one of them was
18 Steve Mays?

19 **A.** Yes, sir.

20 **Q.** Can you tell me who Steve Mays is?

21 **A.** Steve Mays is -- his title is Vice President of
22 Regulatory Affairs and he also works within the Corporate
23 Security and Regulatory Affairs section.

24 **Q.** Can you explain how your responsibilities differ from
25 his responsibilities?

1 **A.** Sure. So, Steve Mays, I think, spends most of his time
2 overseeing our distribution centers. We have 27-odd
3 distribution centers for human health across the country and
4 the regulatory requirements at those distribution centers
5 are quite extensive. And so, it includes extensive
6 recordkeeping and inventory requirements, security
7 requirements.

8 DEA is very specific about what happens at one of our
9 distribution centers right down to the thickness of the
10 vaults that contain our Schedule II products. And so, it's
11 quite a bit of work. He manages a team of regional
12 directors and each one of those regional directors oversees
13 the work of Compliance Managers.

14 So, at each and every distribution center we have a
15 Compliance Manager that ultimately reports up through the
16 regional managers to Steve May (sic) -- Steve Mays, I'm
17 sorry, and I think he numbers about a hundred or so
18 employees in his section.

19 **Q.** So, I don't want to put words in your mouth, but I feel
20 like when I'm understanding your explanation, and I would
21 like you to tell me if I'm correct. And so, does Mr. Mays
22 kind of work with Diversion Control issues internally;
23 whereas, you're focused on external and customer-facing
24 issues; would that be fair?

25 **A.** I think I would -- I think I would describe it more

1 that there is some sort of independence there in terms of
2 what our roles are. Certainly, you know, I do not get
3 involved in those sorts of issues around what the regulatory
4 requirements there, except for there is some back-and-forth
5 and the back-and-forth would involve when we have a theft
6 situation that we investigate, either a last-mile courier
7 situation.

8 At that point, we would work together because I would
9 have the people that would get involved with following up
10 that. So, I don't want to give the impression that we're,
11 you know, stove-piped and that we don't interact.

12 I think you are correct in that, you know, my role,
13 Diversion Control, most of my team, those are all
14 customer-facing in terms of we're monitoring and evaluating
15 our customers across the country and that includes all of
16 our customer types, pharmacists, pharmacies, hospitals,
17 clinics, practitioners, manufacturers, distributors.

18 **Q.** Prior to you joining the company, was there someone who
19 was executing Diversion Control functions in this
20 customer-facing role?

21 **A.** Could you give me a period of time?

22 **Q.** Well, immediately prior to you joining?

23 **A.** Ed Hazewski was the principal person responsible for
24 order monitoring and the due diligence efforts Diversion
25 Control Team.

1 **Q.** And prior to joining, do you know who Ed Hazewski
2 reported to?

3 **A.** I can't say definitively whether it was Mr. Mays or Mr.
4 Zimmerman.

5 **Q.** And tell the Court who Mr. Hazewski is.

6 **A.** Mr. Hazewski is a former employee of AmerisourceBergen.
7 He retired, I guess, about three or four years ago now. He
8 occupied that position, I would say, for approximately nine
9 years, eight years.

10 Prior to his employment with AmerisourceBergen, he was
11 a police officer, a detective. He -- I believe he was a
12 polygrapher, as well, in his former career in law
13 enforcement.

14 **Q.** And so, Mr. Hazewski was handling customer due
15 diligence efforts for the company at that time; is that
16 correct?

17 **A.** So, when you say "handling", certainly, he had
18 oversight of the diversion aspect of that. Of course,
19 there's a lot of other parts of the company who touch
20 customers but, yes, for Diversion Control. So, I'm just
21 trying to marrow on that.

22 **Q.** Let's move forward a little bit. Do you believe
23 there's an opioid crisis?

24 **A.** Yes.

25 **Q.** Do you believe there's an opioid crisis in West

1 Virginia?

2 **A.** Yes.

3 **Q.** Do you believe there's an opioid crisis in Cabell
4 County?

5 **A.** A couple of things. I guess I wouldn't say presently.
6 Is your question for present state?

7 **Q.** I'm sorry. I didn't understand your answer.

8 **A.** Is your -- are you asking me present state, do I
9 believe there is an opioid problem in Cabell County?

10 **Q.** Correct.

11 **A.** Okay. So, you know, again, as part of my role and
12 responsibility, I do, of course, try to keep informed on,
13 you know, different abuse of pharmaceuticals and we're
14 discussing opioids here. So, I track that sort of
15 information. I think it's important for me to be aware of
16 it so that I can be responsive to the extent that a
17 wholesale distributor can be responsive to it.

18 I think there has been, in looking at prescribing rates
19 during the last -- you know, maybe going back to 2011
20 through the present for opioids, prescribing rates across
21 West Virginia or across the country have gone down year over
22 year. Just this year, they've gone down double digit and
23 we're at -- if I remember the last news on this that I read,
24 we're at 2003 levels when it comes to opioid prescribing.

25 So, I think there's been a tremendous improvement on

1 the issue. I still think we have a ways to go in terms of
2 opioid misuse and there's still some work to be done.

3 Specifically narrowing down to Cabell County, I can't
4 -- I can't speak, you know, to a level of do I know the
5 level of folks that are getting treated in Cabell County who
6 suffer Opioid Use Disorder? I do not.

7 **Q.** So, you said as part of your role in Diversion Control,
8 you undertake efforts to become familiar with drug abuse
9 issues, correct?

10 **A.** I do. I try to gather as much information as I can
11 relative to any of these issues that may be -- you know,
12 could help me with my job.

13 **Q.** And you also have some familiarity with drug abuse
14 issues from your work with DEA, correct?

15 **A.** Yes, sir.

16 **Q.** So, maybe you'll recall we discussed this during your
17 deposition, but do you agree that a person can be prescribed
18 an opioid for a legitimate reason and then transition to a
19 point where they're misusing and abusing that drug?

20 MR. RUBY: Objection, Your Honor, calls for expert
21 opinion.

22 MS. MCCLURE: Objection, I join in that and also
23 suggest that to the extent it calls for lay opinion, we also
24 object.

25 MR. PIFKO: Your Honor, he testified that he makes

1 himself familiar with drug abuse issues as part of his job
2 responsibilities and as a 30-year veteran of the DEA.

3 THE COURT: Overruled. I'll let him answer.
4 Overruled.

5 THE WITNESS: Can you repeat your question, sir.

6 BY MR. PIFKO:

7 **Q.** Yeah. I asked if you recall, we discussed this in your
8 deposition, that you believe that someone can be prescribed
9 an opioid for a legitimate medical purpose and then
10 ultimately transition and become -- abuse that drug and
11 become addicted and use it for illegal purposes?

12 **A.** Sure. Thank you.

13 So, I think that in the realm of things that are
14 possible, I think that if you have someone, an athlete that
15 gets injured, then goes to his physician and is being
16 treated, at some point, his physician may change his
17 treatment and, again, there's a lot of surmising here, and
18 that person can no longer get those prescriptions filled or
19 doesn't receive the prescription itself. Can that person
20 then on his own go out into the streets and find a
21 substitute for those drugs that he was taking? I think, in
22 the realm of possibilities, yes, that can -- that can
23 absolutely happen.

24 I guess I would just add, do I have any empirical data
25 that I have studied that would show me to the extent that

1 something like that has occurred, I do not, and I am not an
2 addiction specialist. So, to the extent that that -- I can
3 solidify it more than just having -- using my common sense,
4 I cannot.

5 **Q.** In your work with DEA, you prosecuted illegal drug
6 traffickers -- or you investigated illegal drug trafficking,
7 correct?

8 **A.** Yes.

9 **Q.** Do you also believe as a result of your efforts to
10 become familiar with drug abuse and your work with DEA that
11 when some of these people have become addicted or are
12 searching for an alternative source of their need that they
13 can also look for heroin?

14 MS. MCCLURE: Same objection as previously, Your
15 Honor.

16 THE COURT: Well, I don't -- Mr. Hester?

17 MR. HESTER: I was just going to object. It calls
18 for speculation.

19 THE COURT: I don't think you've laid a sufficient
20 foundation to extract any knowledge from him on this subject
21 yet, Mr. Pifko. I'm going to sustain the objection to that
22 question.

23 MR. PIFKO: I'll see if I can --

24 THE COURT: You can try it again, if you want to.

25 MR. PIFKO: All right. I'll see if I can ask a

1 few more questions for you.

2 BY MR. PIFKO:

3 **Q.** So, when you worked for DEA, did you investigate
4 illegal heroin trafficking?

5 **A.** I did.

6 **Q.** I'm not going to ask you about any -- the DEA had sent
7 a Touhy letter. I'm not going to ask about any -- so
8 everybody here knows, I'm not going to ask about any
9 investigations or any investigative tactics, but in
10 connection with your efforts to investigate illegal heroin
11 trafficking, did you become familiar with the pathway by
12 which people came to use heroin?

13 MS. MCCLURE: Your Honor, I still feel like that
14 question additionally continues to call for speculation and
15 it is not the appropriate foundation laying method.

16 THE COURT: Well, overruled.

17 Answer it if you can, Mr. May.

18 THE WITNESS: Yes, sir.

19 I think that in the course and thinking back in the
20 various times where I've investigated heroin trafficking --
21 and heroin trafficking is cyclical. There were the early
22 2000s in Charlotte, North Carolina where I saw black tar
23 heroin investigations extensively day in and day out. We
24 spent a lot of time there.

25 I spent time in the late 90s in Baltimore investigating

1 heroin trafficking organizations.

2 In my days in New York City, I investigated
3 Columbian-based heroin traffickers.

4 So, these were all cycles of heroin trafficking, but
5 I'll tell you, sir, that, you know, when we were doing these
6 investigations, we were investigating to the extent that we
7 could the highest levels of the organizations. And so, we
8 would not by nature of our investigations look -- look to
9 see, you know, who ultimately the user community of those
10 drugs. That's just not a level that we even operated at, so
11 I couldn't -- couldn't draw any conclusions about what
12 caused, I guess, someone to start using heroin.

13 THE COURT: I'll sustain the objection.

14 MR. PIFKO: We'll move on, Your Honor.

15 Can I get plaintiff's Exhibit 898?

16 May I approach?

17 THE COURT: Yes.

18 THE WITNESS: Thank you, sir.

19 BY MR. PIFKO:

20 **Q.** Mr. May, you have in front of you Exhibit 8 --
21 Plaintiffs' Exhibit 898. Can you take a look at this and
22 tell me if you know what this is?

23 **A.** This appears to be a PowerPoint presentation that I
24 prepared with others and the intent of the presentation was
25 to provide this information in slides to a group called

1 NADDI. And NADDI would be the National Association of Drug
2 Diversion Investigators.

3 **Q.** And you can see there's the presentation in the back
4 pages and the front page, there's an e-mail where you're
5 sending the slides to someone. Do you see that?

6 **A.** I do, yes.

7 **Q.** It's dated October 6, 2016. Does that sound about --
8 around the time that you gave this presentation?

9 **A.** That sounds about right, yes.

10 **Q.** And who is Kimberly St. John?

11 **A.** Kim St. John is an admin employee of CSRA.

12 **Q.** Why were you sending her these slides?

13 **A.** I was asking her for some assistance with a formatting
14 of the slides. My PowerPoint skills are not very good.

15 **Q.** I hear you. So, you authored the substance of these
16 slides; is that correct?

17 **A.** I put a -- I put a lot of the work into the slides.
18 There may have been others that I asked for help gathering
19 some of this information. I see here I have Bruce Gundy.
20 It says "Bruce". And he is the gentleman that reports to me
21 that oversees security investigations. And so, I was asking
22 for his input, as well, here.

23 **Q.** The notes that are written under the slides, are those
24 your notes?

25 **A.** They are my notes.

1 **Q.** Where did you give this presentation?

2 **A.** So, this was at a Naddi conference and it -- I believe
3 it actually was in Pittsburgh. I've done a couple of these
4 presentations. So, hopefully, I'm not confusing the
5 location. At least one of them was in Pittsburgh. And I
6 can't recall where the other one was.

7 **Q.** Do you recall approximately how many people attended
8 the conference?

9 **A.** I do not.

10 MR. PIFKO: Your Honor, I would move to admit 898
11 into evidence.

12 THE COURT: Any objection?

13 MS. MCCLURE: No, Your Honor.

14 MR. RUBY: Your Honor, only to the extent that the
15 PowerPoint itself is an out-of-court statement and we would
16 object as hearsay to the extent it's offered for the truth.

17 MR. ACKERMAN: Your Honor, David Ackerman. I
18 don't think -- I don't know if my microphone is on. This is
19 a document that was served last night and did not receive
20 any objections from any defendants to this document, so it
21 would be our contention that a hearsay objection, which is a
22 non-authenticity objection, needed to either be disclosed
23 last night or it is waived.

24 MR. PIFKO: Or where it's the statement of a party
25 opponent.

1 THE COURT: Well, is it offered for the truth?
2 What's it offered for?

3 MR. PIFKO: Well, it's offered to understand Mr.
4 May's views about Diversion Control and the circumstances of
5 the prescription opioid epidemic.

6 THE COURT: I'm going to overrule the objection
7 and admit it. It's admitted.

8 **PLAINTIFF EXHIBIT 898 ADMITTED**

9 BY MR. PIFKO:

10 **Q.** Let's turn to the first slide here. There's some notes
11 here. It says, "There are probably around 800 wholesale
12 distributors in the U. S., but the three largest, McKesson,
13 Cardinal and AmerisourceBergen, have a combined market share
14 in excess of 90%." Do you see that?

15 **A.** I do see that.

16 **Q.** Okay. You believed that to be true at the time?

17 **A.** A couple of things on my notes. First, to be clear,
18 the notes I used as a guideline as I prepared, so I did not
19 read these notes during the presentation. I just want to
20 point that out.

21 I gathered certain information as I prepared for this
22 presentation and I would have gathered those facts
23 presumably from information that was available to me in my
24 role. So, to the extent that I mean 800 wholesalers, I
25 would have gathered that information at that time.

1 Unfortunately, sitting here now, I can't tell you what the
2 source is.

3 **Q.** Okay. But you believed -- based on the information
4 that you gathered, you believed that statement to be true,
5 correct?

6 **A.** I believe it is true approximately to those numbers.

7 **Q.** You have a statement here saying -- kind of deriving
8 from that statement, you say at the end here, talking to
9 people who might be investigating diversion, you say, "So,
10 if you were investigating a pharmacy and you wanted to
11 gather information about sales of certain controlled
12 substances, you have a better than 90% chance of getting
13 that information by issuing a subpoena to all three
14 companies." Do you see that?

15 **A.** I do see that, yes.

16 **Q.** And what did you mean by that?

17 **A.** So, putting this in context, I'm in a room with
18 investigators from various state, and local, and federal, in
19 this case, in this particular meeting, diversion
20 investigators from across the country. And the objective,
21 my objective in the briefing, having had my law enforcement
22 career and having to conduct investigations sometimes
23 knowing -- knowing the various industries and the people who
24 to contact can sometimes be a challenge.

25 So, here is my effort to educate folks, law enforcement

1 folks, on how we, the industry, can collaborate and assist
2 them with their investigations. And so, here, I'm offering
3 to them, if you have an investigation, you don't know who
4 the drug wholesaler is, you can simply serve a subpoena on
5 the three main ones and there is a good chance that you will
6 identify a customer.

7 **Q.** Going to the next page, you have a discussion about
8 what you say in the notes are four baskets of a Diversion
9 Control Program. Do you see that?

10 **A.** I do.

11 **Q.** So, let's go through these. These are -- I mean, as
12 your words, baskets of a program. These are attributes that
13 you believe are necessary to a Diversion Control Program; is
14 that correct?

15 **A.** Yes. First, the term "basket" is probably
16 oversimplified, but it seems to work for me. And, yes, I
17 believe in terms of my program at AmerisourceBergen, these
18 are elements that would be part of a Diversion Control
19 Program.

20 **Q.** So, let's talk about what these are.

21 **A.** Okay.

22 **Q.** "Know your customer due diligence." That's a
23 statement, the first one you have there, right?

24 **A.** Yes, sir.

25 **Q.** What is "Know your customer due diligence"?

1 **A.** Well, this is a concept that as we're engaging with a
2 potential customer, we would collect certain information
3 from that customer. And when I say "we", the Diversion
4 Control Team. The company itself would also collect
5 information, but we would collect our own information and,
6 as part of that process, the information would be collected
7 and evaluated. And the purpose of that was to -- to make an
8 assessment in terms of the customer and whether we would
9 want to take that customer on in terms of the sale of
10 controlled substances and listed chemicals. And so, it
11 would be a risk assessment.

12 You know, to be clear, looking at the regulations,
13 there's nowhere in the regulations, the CFR, around the duty
14 to collect due diligence. You don't see the words "due
15 diligence". But from my perspective and my understanding of
16 what the regulator would want, he would want us to engage in
17 this, or her, would want us to engage in this process of
18 collecting this sort of information.

19 **Q.** So, you said that, you know, you would be collecting
20 this information to determine whether -- to make a risk
21 assessment, like you said?

22 **A.** Yes, sir.

23 **Q.** What factors -- and you specifically said that in the
24 context of a risk assessment, as far as whether the company
25 should be selling controlled substances to that customer,

1 correct?

2 **A.** Correct.

3 **Q.** So, what factors would you be looking at to make such a
4 risk assessment?

5 **A.** Sure. There's a variety of information that we
6 collect. We collect the -- I call it biographical
7 information. So, we would make sure that the person was --
8 had all -- the entity had all of the appropriate licenses
9 and registrations. And that would be the first part, that
10 we would collect information, you know, about address and
11 delivery locations.

12 We would collect information about potential other
13 distributors that the customer had used or was using at the
14 time. We would collect information about any adverse
15 actions that may have been taken. We would ask those
16 questions and then we would try to verify that information.

17 We would collect information about the various
18 anticipated purchasing levels of certain controlled
19 substances. And we would also collect information about the
20 prescribers, the top prescribers, for those customers.

21 And I just want to lay a little foundation here in
22 terms of when I'm explaining this, I'm specifically talking
23 about a pharmacy registrant. We also have registrants that
24 we service that are hospitals, and clinics, and
25 practitioners, and what -- what we collect from them and

1 what we do with that information is going to look a little
2 bit differently depending upon who the registrant is.

3 So, I just want to make sure that when I -- when I'm
4 providing this information, it's in the context of, in this
5 particular case, I have just described what we would do with
6 a retail pharmacy.

7 **Q.** And that is what we're interested in here, is in your
8 activities with respect to retail pharmacies, so that is a
9 correct assumption and, going forward, if I ask you
10 questions about that, I'm interested in due diligence with
11 respect to those types of customers.

12 So, you provided a bunch of information there. When
13 you said you look for top prescribers of a potential
14 customer, what do you do with information about potential
15 prescribers or top prescribers of a potential customer?

16 **A.** We would validate the licenses for those top
17 prescribers and we would check public data sources relative
18 to any information that might be available. We would --
19 where we're able to, we would check with the Medical Board
20 in the state where that prescriber was operating to see if
21 there had been any adverse actions against a license.

22 And, also, in terms of the number of prescribers, I'm
23 not sure. It's either five or ten, top five or top ten.
24 Just want to -- so, I just want to make it clear that we're
25 not collecting all of that practitioner information when we

1 do this process.

2 Q. To help put some context and allow the Court to
3 understand your analysis, can you give a profile of the --
4 when you're doing this risk assessment, of the types of
5 attributes of a customer that would be negative that you
6 would not want to do business with them?

7 MS. MCCLURE: Objection, vague. Confusing.

8 THE COURT: Overruled. I think he -- he just
9 testified that --

10 Answer the question, Mr. Mays.

11 THE WITNESS: Yes, sir.

12 So, when we evaluate a customer, you know, we have this
13 totality of the circumstances-type evaluation. Not only --
14 that goes for evaluating an order of controlled substances,
15 as well as a customer.

16 And so, there is a whole spectrum of information that
17 we may gather. We may gather information on a potential
18 customer and prescribers and, at that one end of the
19 evaluation, there may be absolutely no adverse information
20 and the decision is quite easy that, okay, hey, there's --
21 we've not found anything that causes us concern relative to
22 the risk for this customer.

23 And then we -- let's move all the way across the
24 spectrum and get all the way over to the other side of the
25 spectrum. And let me suggest that there may be certain --

1 certain things that would cause us concern and we would
2 consider those in on-boarding a customer.

3 So, if I had a customer who -- a potential customer who
4 was being evaluated and indicated to me that they had been
5 terminated by another -- another distributor for concerns
6 about their dispensing, that would be a concern.

7 If I saw, in terms of the data I collected of their
8 anticipated purchasing of controlled substances and I saw
9 that, you know, there were significant quantities that were
10 being requested by the customer for future purchasing, that
11 would be a concern.

12 If I saw that out of the ten prescribers, and I'm just
13 throwing out a number, seven of them had recent adverse
14 action taken against their licenses relative to their
15 prescribing practices, those would all be elements of our
16 review that would cause me concern.

17 Could that concern rise to the level where we would
18 make a decision not to service that customer? Yes. Has
19 that happened? Yes.

20 Has it happened frequently? I don't know that I could
21 categorize it. I would say it's a small percentage of the
22 customers that we evaluate that we make that decision, well,
23 we just -- we just don't believe that this is going to be a
24 relationship we want to engage in.

25 BY MR. PIFKO:

1 **Q.** You mentioned that significant quantities of
2 anticipated purchases would be a concern. Why is that a
3 concern?

4 **A.** I think that any one of those things that I mentioned
5 could be a concern and if I have a pharmacy that's stating
6 they want to purchase significant quantities, that may or
7 may not make sense. If it's a very small pharmacy and they
8 want to purchase significant quantities, that might not make
9 sense.

10 It may be a very large pharmacy. There's a really big
11 spectrum when it comes to pharmacy operations and
12 communities that are serviced and so, but larger quantities,
13 particularly by a smaller customer, could be an area that we
14 want to investigate. I -- you know, I don't know
15 specifically if that answers your question or not.

16 **Q.** Why would the larger quantities purchased by a smaller
17 customer be something that you would want to investigate
18 further?

19 **A.** It's one of the -- it's one of the many factors that we
20 consider and evaluate. I'm not sure I can put a why to it.

21 **Q.** Does AmerisourceBergen write this information down or
22 document it somewhere?

23 **A.** Could you clarify what information that is?

24 **Q.** We were just speaking about the know your customer due
25 diligence, and on-boarding, and we talked about some of the

1 information that you collect and the significance of that
2 information. Does AmerisourceBergen document that
3 information when it collects it?

4 **A.** Yes.

5 **Q.** And am I correct that currently AmerisourceBergen has
6 around 40,000 customers?

7 **A.** I'm sorry, sir, how many?

8 **Q.** 40,000, 4-0?

9 **A.** So, I'm more familiar with the number of customers that
10 we have that are purchasing controls and listed chemicals.
11 That's what my focus is. So, customers that are not
12 purchasing controls, I'm not sure what that total number
13 looks like.

14 **Q.** Okay. Well, what's your understanding of how many
15 customers that AmerisourceBergen has that are purchasing
16 controls?

17 **A.** It's in the neighborhood of 22,000.

18 **Q.** Okay. So, that's more customers than you can commit
19 that to memory, so you need to write this information down
20 so that you can access it, right, with 22,000 customers?

21 **A.** So, I guess getting back to your question, we
22 absolutely document the information that we collect from our
23 customers during the evaluation process and, you know, so
24 that form that we collect that contains the responses. We
25 collect photos. We search public data sources. We collect

1 the licensure information. Any pertinent information that
2 we learn.

3 If we had a Board of Pharmacy Report or a Medical Board
4 Report, we would capture all of that information and put it
5 into the electronic file.

6 Presently, we've developed a file, an electronic filing
7 system, called ARCHER. Previous to that, it was Matter
8 Management. And previous to that, it was LawTrac.

9 COURT REPORTER: I'm sorry, was what?

10 THE WITNESS: LawTrac, excuse me. L-a-w-T-r-a-c.
11 That pre-dates me in terms of some of those systems, to make
12 it clear. In 2014, when I joined, it was LawTrac, but we
13 had transitioned shortly thereafter to Thomson Reuters and
14 now we're on our third system, ARCHER.

15 **Q.** So, to allow the Court to understand a little bit about
16 how you're tracking this information, is there a name of the
17 form that you use to collect this information from a
18 prospective customer?

19 **A.** From a retail pharmacy customer, it's called a Form
20 590, 5-9-0.

21 **Q.** And we were talking about these databases that were
22 used, LawTrac, Matter Management and ARCHER. Then these are
23 sort of data warehouses where then you can store information
24 about these customers; is that correct?

25 **A.** Yes, sir.

1 **Q.** And then, from time to time, you might need to access
2 information if you're doing an investigation and you might
3 want to know about -- something about the customer, so you
4 would use LawTrac, Matter Management or ARCHER to pull up
5 that information, correct?

6 **A.** Correct.

7 **Q.** Can you still -- so, I guess I want to understand the
8 ability to access that information. So, you mentioned the
9 change of these databases. Is the information that was in
10 LawTrac, was that then put into the Matter Management system
11 so that, if you had a customer whose information was stored
12 in LawTrac, then when the company switched systems, you
13 could still access that information about that customer?

14 **A.** So, there was an exercise that was performed where the
15 documentation within LawTrac, when the system was closed,
16 for lack of better terms, that information was extracted and
17 put into hard copy or, I'm sorry, put into digital copy and
18 preserved in a system.

19 I can't be more specific with what the name of the
20 system was and how exactly that worked, but there was this
21 exercise where this information was removed and stored so
22 that we would have future access to it.

23 **Q.** Right. So, that's really what I'm trying to understand
24 is, if you -- today, if you're investigating a customer, how
25 far back -- let's say it's a customer that has been with a

1 company since 2004, how far back -- if you want to do an
2 investigation of that company, how far back can you look at
3 that information?

4 **A.** So, a couple of things. In terms of how we were
5 operating prior to 2007, we were not collecting this sort of
6 form and -- from our customer. And so, there was a period
7 of time where these forms weren't collected.

8 You know, pursuant to the work we did with DEA in 2007,
9 we agreed to start collecting this sort of information. So,
10 there are certainly customers that we have to this day
11 where, you know, we didn't collect that information when we
12 on-boarded them. And we may or may not have collected it
13 since that time.

14 My understanding of the agreement that we had with DEA
15 in 2007 is they did not have the expectation that we would
16 go back and sort of grandfather those customers and get
17 those forms from those customers. My understanding of the
18 agreement is that, going forward, we would collect that
19 documentation.

20 **Q.** Okay. But to the extent there is -- there was
21 information collected about a customer historically, are you
22 still able to access that customer, that information, today?

23 **A.** So, from 2007 forward and if it was saved to one of
24 those three systems, of course, one is current, but the
25 answer would be yes, you should still be able to do research

1 and retrieve that information.

2 **Q.** Let's go back, looking at the document they have in
3 front of you, 898. The next bullet point you have is one of
4 these baskets of the Diversion Control Program System to
5 detect and report suspicious orders. Do you see that?

6 **A.** Yes.

7 **Q.** Can you describe what that means?

8 **A.** Wholesale distributors and manufacturers have a
9 regulatory requirement to have a system to identify and
10 report suspicious orders. And so, in order to carry out
11 that obligation at AmerisourceBergen, we have what we refer
12 to as an Order Monitoring Program. That was a term that was
13 phrased prior to my arrival but that we continue to refer to
14 it as the Order Monitoring Program.

15 And, you know, just for clarity sake, others in the
16 industry, regulators even, may refer to this as a Suspicious
17 Order Reporting System, or SORS. It's the same thing. It's
18 one and the same. Within AmerisourceBergen, that system is
19 our own.

20 **Q.** We discussed this in your deposition, but am I correct
21 that your understanding of the law and regulation is that if
22 you identify an order as suspicious, you must not ship it;
23 is that correct?

24 **A.** So --

25 MR. HESTER: I object, Your Honor. I think

1 there's no time frame to the question.

2 THE COURT: Right. It's, I think, critical that
3 there be a time frame to that question, so you can rephrase
4 it, Mr. Pifko.

5 MR. PIFKO: Well, I'm just asking him generally if
6 he understands that the law and regulation requires him not
7 to ship an order that's identified as suspicious.

8 MS. MCCLURE: Your Honor, just for clarity for the
9 record, Mr. Pifko has been indicating that Mr. May was a
10 30(b)(6) deponent. I just want to be clear that the period
11 of time for which he was a 30(b)(6) deponent was 2015 to
12 2018. Moreover, I believe this question calls for a legal
13 conclusion.

14 MR. PIFKO: Your Honor, I don't -- I don't think
15 the time period is relevant to my question. I'm just asking
16 him what he understands the law and regulations to be and,
17 as far as a legal conclusion, I'm not asking him for the
18 purposes of him instructing the Court what law is. He's the
19 head of Diversion Control and I would like to have him
20 explain to you what he thinks the law is.

21 THE COURT: Well, I think -- I'm going to sustain
22 the objection. I think that the time period is critical
23 here. The objection is sustained.

24 BY MR. PIFKO:

25 Q. How about when you joined the company, do you believe

1 that the law and regulation requires you to block an order
2 and not ship it if it's suspicious?

3 **A.** In 2014, when I joined the company, my understanding
4 from all of the conversations and the work that I did with
5 members of CSRA was that AmerisourceBergen, when they would
6 report a suspicious order, whenever that occurred, that
7 order would be cancelled and never shipped. That was the
8 understanding that I had when I walked into the door of
9 AmerisourceBergen in 2014.

10 And going forward, the program that I've overseen,
11 whenever we designate an order as suspicious and we report
12 it to DEA, that order is cancelled and rejected. It's not
13 picked, packed or shipped.

14 **Q.** Okay. Your answer was about what the program is. I'm
15 just asking you, as the head of Diversion Control, what your
16 understanding of the law and regulation is. As of 2014, did
17 you understand that you were required to block an order that
18 was identified as suspicious?

19 MS. MCCLURE: Your Honor, calls for a legal
20 conclusion.

21 THE COURT: Well, Mr. Ruby, did you want to say
22 something?

23 MR. RUBY: We join in that objection, Your Honor.

24 THE COURT: Well, I think he's asking him what his
25 understanding was and I'll allow him to answer that.

1 THE WITNESS: So, when I joined the company -- you
2 want to know what my understanding was or do you want to
3 know what my understanding is today?

4 BY MR. PIFKO:

5 Q. When you joined the company?

6 A. So, when I joined the company, I believed that the
7 regulation required suspicious orders to be cancelled. That
8 was the belief. And that belief was based upon my
9 conversations with others at the company, as well as the
10 actual operations at the company, in terms of how they
11 handled suspicious orders.

12 Q. Thank you. So, let's -- what's your understanding of
13 what a suspicious order is?

14 A. So, do you want what the regulation states? I mean, a
15 suspicious order is one that AmerisourceBergen has said we
16 believe this order fits within the realm of what the
17 regulation states is a suspicious order.

18 Q. Okay. And what's your understanding of the realm of
19 what the regulation states is a suspicious order?

20 A. So, the language in the regulation refers to orders
21 that could be -- could be suspicious; in other words,
22 includes orders of an unusual size, unusual size, orders
23 that deviate from a normal pattern, or orders of unusual
24 frequency.

25 Q. Let's move on to the next bullet point in your baskets

1 of Diversion Control. So, the next one is continuous
2 monitoring or due diligence. Do you see that?

3 **A.** I do.

4 **Q.** What do you mean by that here?

5 **A.** So, the notion here is when we on-board a customer, we
6 have a process, and it's getting to know the customer, but
7 the sense here is, and the goal here is to continue to
8 monitor that customer. So, due diligence doesn't end after
9 we've collected the forms.

10 And due diligence means a lot of things to a lot of
11 people in the industry. And from my perspective, you know,
12 due diligence includes our everyday monitoring of the orders
13 that are placed by our customers.

14 Once we've taken that customer on and they have the
15 authority to purchase controls, it's important for us, of
16 course, in the execution of the Order Monitoring Program to
17 assess each and every order that they place for controlled
18 substances or listed chemicals.

19 But we've also developed some very powerful analytics,
20 I think, very powerful analytics, where we look at the
21 customer purchasing activity wholistically and over a period
22 of time. And so, you know, I would include that as part of
23 our due diligence process.

24 There are times when looking at those analytics and
25 looking at OMP, that we may decide to gather additional

1 information directly from the customer and when -- when we
2 decide to do that, it may be simple -- a simple e-mail to
3 the customer asking about a particular order or it may be a
4 visit to the customer either by a member of one of our teams
5 or with our outside consultants that assists us with those
6 sorts of visits.

7 So, again, looking at this notion is we continually
8 monitor the customer. It's done through a variety of ways,
9 order monitoring analytics, and engagement with a customer,
10 and I would include all of those activities under continuous
11 due diligence.

12 **Q.** I don't want to get everybody over there jumping up and
13 down with objections, so I want to preface this question.
14 I'm not going to ask you about the attributes of this
15 analytic system right now, but I just want to -- you
16 mentioned that you developed an analytics system. When was
17 that system developed?

18 **A.** Working with our outside consultants who assisted us
19 with the review and enhancement of our Order Monitoring
20 Program in 2014 and 2015, during that time period, we also
21 looked at the analytics that we were collecting, because the
22 company was collecting analytics at that time, but the
23 analytics were in the form of mostly spreadsheets. They
24 contained data that was relevant to due diligence reviews
25 and helped inform us.

1 But looking at a spreadsheet versus a dashboard is --
2 certainly, looking at the dashboard is a more efficient way
3 of doing it visualization-wise. And so, what we decided to
4 do in this period of time is to work with our outside
5 consultants and take a look at those analytics that we had
6 been collecting and say, hey, is there a better way we can
7 do this? Can we make this more user friendly?

8 And so, that was part of the work. We took some of
9 what we were collecting up until that period of time and
10 then we built upon that and we developed these dashboards
11 that we -- we utilize in a software program called Tableau.

12 **Q.** That consultant that you worked with, they were called
13 FTI Consulting, correct?

14 **A.** Yes.

15 **Q.** You mentioned as part of this continued monitoring or
16 due diligence doing a site visit; do you recall saying that?

17 **A.** Yes.

18 **Q.** What would someone look for in a site visit as part of
19 the continuous monitoring?

20 **A.** I mean, I can describe what we -- what that involves
21 for AmerisourceBergen.

22 **Q.** Yeah, that's what I'm asking.

23 **A.** So, we had engaged, prior to my arrival at
24 AmerisourceBergen, with Pharma Compliance Group. They are a
25 third-party contracting company. And most of the employees

1 are either former DEA diversion investigators or special
2 agents. And the company had engaged with them to do what I
3 would describe as surveillance-type visits where they drive
4 to the location and make certain observations, which were
5 then recorded on a report, and that report would be
6 furnished to the Diversion Control Team and it would be
7 saved to one of those files where we would document that
8 information.

9 After my arrival in 2014, we began to evaluate, you
10 know, some of the things that that outside consultant was
11 doing and, like everything else, you know, things change in
12 terms of drug abuse patents and red flags. And so, we
13 wanted to make sure that we were keeping up with that.

14 So, we changed, in essence, what that outside
15 consultant was doing. We developed a pretty extensive
16 questionnaire. I think it was between 10-12 pages.

17 They would actually go into the pharmacy, meet with the
18 pharmacist, or pharmacist in charge, or owner. They would
19 review those questions with them. Ultimately, they would
20 respond -- you know, we would develop our responses to all
21 of those questions and then we would be furnished a report
22 by this group.

23 **Q.** You mentioned the concept of red flags in connection
24 with these investigations. What's a red flag?

25 **A.** So, there are red flags that we have -- potential red

1 flags we have visibility to -- from a distribution -- our
2 distribution analytic. So, looking at these dashboards, we
3 may see purchasing by the pharmacy of controlled substances
4 at an elevated level. It may be purchasing of controlled
5 substances, certain controlled substances. The ones that
6 are more high risk at an elevated level. And so, those
7 could be potential red flags that may lead to us conducting
8 the due diligence investigation.

9 **Q.** What kind of controlled substances are more high risk?

10 **A.** So, in our Order Monitoring Program, it's a risk
11 adjusted program where we have about 70 drug families that
12 we monitor and we break out those 70 drug families into high
13 risk, medium risk, and low risk. And then, the purpose of
14 doing that is so that we can essentially shine a clearer
15 light on the high risk end of the spectrum versus the lower
16 risk end of the spectrum.

17 And so, within our high risk, you would find oxycodone,
18 hydrocodone, Hydromorphone, codeine with Promethazine, and
19 several others.

20 **Q.** And those are opioid products generally?

21 **A.** Most of the ones that I just listed were, yes.

22 **Q.** Do you have an understanding about why those are
23 categorized as high risk?

24 **A.** So, I want to just clarify one point. At
25 AmerisourceBergen, we have our process where we designate

1 risk levels and, of course, the regulated -- DEA has also
2 scheduled controlled substances II through V. And so, they
3 have a methodology to do so and we have a methodology. I
4 assume that you want to hear about our methodology.

5 **Q.** Yes, I do. Thank you.

6 **A.** Okay, thank you. So, in fact, we actually, in
7 determining what's high risk, we actually consult with the
8 scheduling, DEA scheduling, to say, well, what does DEA
9 consider to be high risk based on scheduling?

10 We also, of course, monitor to the extent that we can
11 abuse trends, drug abuse trends. And that information, you
12 know, can be found in public stories and news articles. We
13 hear information from regulators, both state and federal,
14 and we'll try to understand that information and any -- in
15 our partnership, in our collaboration with other industry
16 participants, other wholesalers, manufacturers where we
17 maybe exchange information, all of that is considered when
18 we sit down once a year and review that high, medium, low
19 risk ranking within our Order Monitoring Program.

20 **Q.** Let's talk about the training and education component
21 now. What do you mean by training and education?

22 **A.** So, I guess we'll talk about training first because I
23 look at them a little bit different, if that's okay.

24 **Q.** Yeah.

25 **A.** So, we -- Diversion Control does some training, and

1 when I say "does some", we put together training materials.
2 We present some of those training materials in person. We
3 also present them electronically.

4 There are different recipients of the training. And
5 so, for example, we train our sales force and we developed,
6 subsequent to my arrival, an electronic training course
7 where we would essentially assign that training
8 electronically to our sales force, our customer-facing sales
9 force, and there was a test associated with the training.
10 And that gave us the capability to, you know, deliver it
11 very efficiently, to modify it. We've probably modified
12 that training now two times and -- and we also can track who
13 we've trained.

14 So, we train our sales associates. We train our own
15 team members. We have two meetings at CSRA every year, at
16 least for the Diversion Control Team where we bring them in,
17 and there's an agenda, and we train them on various facets
18 of the program.

19 We have, of course, initial on-boarding training for
20 members of the Diversion Control Team that they go through.
21 We have general awareness training at all of our
22 distribution centers, which is executed by Compliance
23 Managers to inform those folks there.

24 So, we have this -- and I could go on. I don't want to
25 belabor it, but we have different groups that we focus on,

1 internal and some external. We do do trainings with our
2 customers, as well. And when I say "training", maybe we do
3 use that term somewhat loosely, but we do -- we have offered
4 CE courses. We have two pharmacists that work in my group
5 and we've done that sort of training, as well.

6 **Q.** Why is it important to train your sales force on
7 Diversion Control issues?

8 **A.** The sales force at AmerisourceBergen represents largely
9 those associates that are out in the field and that are
10 meeting with the customers. So, they're dispersed
11 throughout the -- throughout the country and they're going
12 into pharmacies, meeting with pharmacists.

13 And so, as that kind of front person for the company,
14 we feel it's important that they're aware of, you know, what
15 is -- what is drug abuse and what is diversion and, you
16 know, what are their responsibilities.

17 **Q.** And so, they're out there in the field, and they're
18 seeing what's happening, and you want them to be able to
19 recognize concerns if they see something; is that what
20 you're saying?

21 MR. HESTER: Object to form.

22 THE COURT: Sustained.

23 BY MR. PIFKO:

24 **Q.** What's the purpose for why you're wanting these sales
25 force people to be aware of these issues?

1 **A.** Again, it's their -- they represent the workforce at
2 AmerisourceBergen that's interacting with the pharmacist,
3 the pharmacist in charge. And so, having them have -- have
4 some level of awareness of what diversion is and
5 understanding their obligations is just something that we
6 feel that we should be doing.

7 **Q.** Do you view the sales force as a component of the
8 Diversion Control Team in a way?

9 **A.** I don't really consider them as a component of the
10 Diversion Control Team, but that's not to say that they
11 assist us with certain processes. So, of course, they would
12 collect due diligence information because, once again,
13 they're the boots on the ground, so to speak.

14 But I would also add, you know, we really try to make
15 an effort to make sure that we, the Diversion Control Team,
16 Corporate Security, operate independently of the business,
17 including sales.

18 So, to the extent that we've used them for certain, you
19 know, administrative collection duties, that's one thing,
20 but we also make sure that they in no way influence any of
21 the work that's being done in evaluating orders or
22 customers.

23 **Q.** I think you mentioned this earlier, but when looking at
24 a customer's behavior as part of your continuous monitoring,
25 that what you really want to be looking at is patterns of

1 the customers' behavior; is that correct?

2 **A.** So, you mentioned patterns. That may be one of the
3 things that we look at in the big picture of everything that
4 we look at.

5 **Q.** Can you explain how a pattern of behavior -- and we're
6 here for opioid issues, so I'm asking this in the context of
7 opioid controlled substances purchasing, how a customer's
8 pattern of opioid purchasing can be a concern?

9 **A.** So, I guess you're asking about pattern. So, we look
10 at the customer ordering activity, opioids or any controlled
11 substances. We look at their overall ordering activity and,
12 based upon that, the nature of that ordering activity, which
13 extends beyond pattern, I think.

14 I mean, I guess I'm a little concerned that we're
15 trying to, you know, kind of fixate on patent, which -- you
16 know, we look at -- we look at the customers and the
17 customers' orders more wholistically.

18 **Q.** Yeah. I'm trying to understand what that means like
19 when you're looking at the customers' behavior and they're
20 ordering in the sense of looking for patterns and how that
21 can be a concern. Can you explain with you're looking for?

22 MR. HESTER: Objection, Your Honor. I think that
23 misstates the witness's testimony.

24 THE COURT: Sustained.

25 BY MR. PIFKO:

1 **Q.** Is one of the things that you look at, as far as
2 patterns, the customers' ordering patterns?

3 MS. MCCLURE: Objection, asked and answered.

4 THE COURT: Sustained.

5 MR. PIFKO: I'm going to move to another document.
6 I don't know if the Court wants --

7 THE COURT: This might be a good place to take a
8 break and switch out the court reporters, Mr. Pifko. So,
9 let's be in recess for about ten minutes.

10 (Recess taken)

11 (Proceedings resumed at 11:08 a.m.)

12 THE COURT: Mr. May, if you would resume the
13 witness stand, please, sir, and you're still under oath.

14 THE WITNESS: Yes, sir.

15 THE COURT: You may proceed, sir.

16 MR. PIFKO: Thank you, Your Honor.

17 BY MR. PIFKO:

18 **Q.** Mr. May, earlier in your testimony when you were
19 talking about a consulting -- FTI Consulting, do you
20 remember that?

21 **A.** Yes.

22 **Q.** In addition to their providing assistance in developing
23 order monitoring issues, it's true that FTI was also hired
24 to perform a review of CSRA's current state process and
25 related compliance activities; correct?

1 **A.** Yes. FTI was engaged to do a, more of a broader view
2 of the CSRA department versus the work they were doing
3 solely for diversion control.

4 **Q.** And they were asked to identify any critical gaps or
5 areas of improvement to provide recommendations for how the
6 company could realize those improvements; correct?

7 **A.** That engagement was not my engagement, so the specific
8 focus would have been whoever engaged them. I think the
9 documents may refer to what the engagement looked like.

10 **Q.** Do you recall being made aware that FTI was asked to
11 identify any critical gaps of areas for improvement to
12 provide recommendations on how the company could realize
13 those improvements?

14 **A.** I recall seeing the results of some of their work.

15 **Q.** Do you, do you recall being made aware that the company
16 paid \$250,000 for their work, for that part of their work?

17 **A.** I was not aware of what was paid for that work.

18 **Q.** I'd like to hand you a document to refresh your
19 recollection.

20 **A.** Thank you.

21 **Q.** P-4 --

22 THE COURT: Well, you've got to ask -- you've got
23 to do this right, Mr. Pifko.

24 MR. PIFKO: Sorry, Your Honor.

25 THE COURT: If you're going to refresh his

1 recollection, you have to establish that there's something
2 that his recollection will be refreshed if he sees
3 something.

4 MR. PIFKO: Okay. Thank you, Your Honor.

5 BY MR. PIFKO:

6 **Q.** Mr. May, I asked you if you recall being made aware
7 that FTI was asked to identify any critical gaps or
8 areas of improvement and to provide recommendations for
9 how we can -- or the company could realize those
10 improvements. And you said you didn't necessarily
11 remember that being something you were made aware of.

12 **A.** Sorry. So my testimony is I was aware that FTI was
13 engaged separately from the work that they were doing with
14 me. I was not responsible for that engagement. And I
15 recall seeing certain documents relative to that engagement.

16 But what specifically was the tasking, because I didn't
17 engage them, I can't sit here and tell you, you know, off my
18 head what that engagement was intended to be.

19 **Q.** But my question is do you remember being told what that
20 engagement was about?

21 **A.** I was -- again, information was communicated to me.
22 The reporting relative to that engagement was reported to
23 me. I don't have, you know, any specific.

24 **Q.** Do you remember Mr. Zimmerman writing an email to you
25 telling you about FTI's engagement and the scope of what

1 they would be doing with respect to that part of it?

2 **A.** So I recall communications with Mr. Zimmerman. They
3 would most likely be email communications around this issue,
4 yes.

5 **Q.** Do you recall what he told you about their engagement?

6 **A.** I, I do not recall specifically. I believe there
7 was -- I believe there was a request to respond to certain
8 of that document that was relayed to his team, me being one
9 of those on his team.

10 THE COURT: If you saw that document, would you
11 remember what he told you about the engagement?

12 THE WITNESS: I may, Your Honor.

13 THE COURT: Okay, you can show him.

14 MR. PIFKO: Thank you, Your Honor. Plaintiffs'
15 943, permission to approach.

16 THE COURT: Yes. And let him look at it and then
17 take it back and then ask him the questions.

18 MR. PIFKO: Okay. I'll have to look at my notes
19 to tell me.

20 BY MR. PIFKO:

21 **Q.** Look at Page 8, please. Do you see on Page 8 that
22 it has P-00943 and then 8 at the bottom? Do you see
23 that?

24 **A.** I see -- just one second and I'll try to find the 8.
25 That's the only thing I'm missing. The 8 would be on the

1 bottom?

2 **Q.** Yes. I know there's different numbers on there, but
3 the Bates number --

4 THE COURT: Are you talking about the very bottom
5 right-hand side?

6 MR. PIFKO: Yes.

7 THE WITNESS: I apologize, Your Honor.

8 BY MR. PIFKO:

9 **Q.** It looks like it was manually printed to Mr.
10 Zimmerman.

11 **A.** Okay. I'll look for that email. Thank you.

12 THE COURT: Read it and then tell us whether you
13 remember what he told you or not.

14 THE WITNESS: Okay. Yes, sir. I recall this
15 email, sir.

16 THE COURT: Okay. You can ask him about it but
17 you can't have him read the document.

18 MR. PIFKO: Okay. Thank you, Your Honor.

19 BY MR. PIFKO:

20 **Q.** Mr. May, does this refresh your recollection that
21 Mr. Zimmerman informed you that FTI had been asked to
22 identify any critical gaps or areas for improvement to
23 provide recommendations for how the company could
24 realize those improvements?

25 **A.** Yes.

1 **Q.** And I believe we discussed this in your deposition. On
2 or around the time that FTI prepared a report, did you
3 receive a copy of that report?

4 **A.** I did.

5 MR. PIFKO: Plaintiffs' Exhibit 93, please.
6 Permission to approach?

7 THE COURT: Yes.

8 THE WITNESS: Thank you.

9 BY MR. PIFKO:

10 **Q.** Please take a minute to look at Plaintiffs' Exhibit
11 93. Let me know when you're ready.

12 (Pause)

13 **A.** I'm ready, sir.

14 **Q.** Okay. Have you seen Plaintiffs' Exhibit 93 before?

15 **A.** I have.

16 **Q.** And is this something that you saw around August 28th,
17 2015? I'll represent to you that the electronic data that
18 accompanied this document had that date on it.

19 **A.** That, that makes sense in terms of timing, yes.

20 **Q.** To your recollection, is that on or around the time
21 that FTI provided a report to the company?

22 **A.** It was around the same time, yes.

23 **Q.** Can you tell me what Exhibit 93 is?

24 **A.** So this is a description by FTI of their process, what
25 they intended -- it would be process, summary and the

1 various areas that they reviewed in terms of their
2 assessment.

3 **Q.** Based on your having seen this before, is this a true
4 and correct copy of FTI's report?

5 **A.** I would say, yes.

6 MR. PIFKO: Your Honor, we move to admit
7 Plaintiffs' Exhibit 93 into the record.

8 THE COURT: Any objection?

9 MS. MCCLURE: Yes. We object on the grounds of
10 hearsay. This is an FTI report. I understand that Mr. May
11 has testified that he's seen it before. But to the extent
12 that this is being offered for the truth, we object on
13 hearsay grounds.

14 THE COURT: Mr. Hester?

15 MR. HESTER: Join in the objection, Your Honor.

16 MR. RUBY: Likewise, Your Honor.

17 MR. PIFKO: Your Honor, this is --

18 THE COURT: What's the purpose of this?

19 MR. PIFKO: It's for two purposes. It can be
20 admitted for notice. The report describes, as Mr. Zimmerman
21 had stated to Mr. May, gaps in -- issues that -- surrounding
22 the CSRA organization. And they, they provided this report
23 within the scope of what they were requested as an agent of
24 FTI.

25 So it falls under two exceptions to the hearsay rule;

1 an authorized statement, and it's also made by an agent
2 within the scope of employment. We've got several cases
3 that support the entry of this document. We'd be happy to
4 submit a brief to you if the Court would like that.

5 THE COURT: What about that, Ms. McClure?

6 MS. MCCLURE: Your Honor, to the extent that the
7 plaintiffs have, have case law on this and would suggest
8 briefing, we would be open to -- I can't speak on behalf of
9 my counterparts, but we would be open to briefing the issue
10 before Your Honor subject to, of course, if the ruling of
11 Your Honor does not find that Mr. Pifko's case law supports
12 the admission of the document, then the corresponding
13 testimony of Mr. May be stricken from the record as well.
14 So that is what we would propose.

15 THE COURT: Do you agree it comes in for the truth
16 of the matter asserted and not just to show notice or state
17 of mind of the defendant here?

18 MR. PIFKO: Correct, Your Honor. There's -- under
19 two exceptions to the hearsay rule, yes.

20 THE COURT: And what exception does it come under?

21 MR. PIFKO: That's under 801(d)(2)(C). It's a
22 statement that was this made by a person whom the party
23 authorized to make a statement on the subject. It's also
24 under 801(d)(2)(D). It was made by the party's agent or
25 employee on a matter within the scope of that relationship

1 while it existed.

2 MS. MCCLURE: Your Honor, may I have a moment?

3 THE COURT: Yes, sure.

4 (Pause)

5 MS. MCCLURE: Your Honor, for the purposes of
6 today, we, we are okay with Mr. Pifko questioning the
7 witness on this subject to if we find that later case law we
8 think disagrees with that, we would submit something to Your
9 Honor on that.

10 THE COURT: Well, it looks to me like it's not
11 hearsay because it comes within 801 --

12 MS. MCCLURE: 801, yes.

13 THE COURT: -- 801(d)(2) as an opposing party's
14 statement -- subsection (C), was made by a person whom the
15 party authorized to make a statement on the subject.

16 Mr. Hester, does that come within that?

17 MR. HESTER: Sounds right, Your Honor.

18 MS. MCCLURE: Yes, Your Honor.

19 THE COURT: Well, I'm going to admit it.

20 MS. MCCLURE: Thank you, Your Honor.

21 MR. PIFKO: Thank you, Your Honor.

22 THE COURT: Appreciate your candor, Mr. Hester.

23 BY MR. PIFKO:

24 Q. The document admitted, Mr. May, I don't need to ask
25 you any questions about it right now. I'll shift gears.

1 Do you have first-hand knowledge that prescription
2 opioids have been historically diverted into the illicit
3 market?

4 **A.** So does that cover my lifetime of work with AB and DEA
5 or what's the --

6 **Q.** Yes, sir, in any context.

7 **A.** So do I have personal knowledge -- could you finish the
8 question?

9 **Q.** Yeah. My question was do you have first-hand knowledge
10 that prescription opioids have been historically diverted
11 into the illicit market?

12 MR. HESTER: Objection. It's vague, Your Honor,
13 on the term "diverted."

14 THE COURT: Overruled. You can answer.

15 THE WITNESS: Thank you, sir.

16 So when I think of diversion, it's a criminal act
17 because what we're saying is -- in my meaning of -- my
18 understanding of diversion is when there is a criminal act
19 because the pharmaceutical prescription has been taken out
20 of the, the closed system and for purposes that weren't
21 intended.

22 So, so to the extent that, you know, my work with DEA,
23 of course, I investigated criminal activity. But I think I
24 described that activity before. The vast majority of that
25 activity -- and when I say vast, greater than 99 percent was

1 directed at criminal drug trafficking organizations who were
2 trafficking illegal drugs. And, so, I can't recall
3 instances during my investigations when I wouldn't become
4 aware of that.

5 And then in, in the work I've done at AmerisourceBergen
6 in, in overseeing the program, I don't recall a specific
7 instance where I had personal knowledge of pharmaceutical
8 opioids being diverted.

9 I think over the course of several years when I've
10 occupied this position, I have learned about certain actions
11 that the regulator has taken against pharmacies. And that
12 would indicate to me that, you know, there was some activity
13 related to diversion.

14 Have I followed through to see if those actions
15 resulted in arrest and convictions, I just don't have any
16 specific memories of that as I sit here. Does that, does
17 that mean that there may have been an instance in my
18 seven-plus years where, with AmerisourceBergen that I've
19 learned somehow, either through an action taken by a
20 regulator, I, I can't say that that's the case either.

21 Sorry for the long-winded explanation. I had to think
22 about it a little bit.

23 BY MR. PIFKO:

24 **Q.** That's okay. Thank you. Do you believe the volume
25 of prescription opioids diverted into the illicit market

1 was a substantial factor giving rise to the opioid
2 epidemic?

3 MR. RUBY: Your Honor, objection, vague as to
4 time.

5 THE COURT: Well, you've got to lay a basis for
6 that.

7 MS. MCCLURE: Your Honor, I'll also object to the
8 extent it calls for an expert lay opinion.

9 BY MR. PIFKO:

10 Q. Mr. May, you've testified that you believe there is
11 an opioid epidemic; right?

12 A. Yes.

13 Q. Through your work at AmerisourceBergen and at the DEA,
14 do you have any sense of what caused the opioid epidemic?

15 A. So I just want to make sure I understand. You want me
16 to opine on what I think caused the opioid epidemic?

17 Q. Well, at this point, my question was just based on your
18 work at AmerisourceBergen and with the DEA if you have an
19 understanding of what caused the opioid epidemic.

20 MS. MCCLURE: Same objections, Your Honor.

21 THE COURT: Overruled.

22 Can you answer it, Mr. May?

23 THE WITNESS: I, I think I can.

24 THE COURT: Go ahead.

25 THE WITNESS: Okay. So looking at, you know, the

1 rise and fall of the opioid epidemic, because I think that
2 we definitely saw where there were more opioids that were
3 being prescribed, right, across the country which was always
4 a big concern of mine when I started with the work, and this
5 level of prescribing still concerns me.

6 And, so, we've seen that level of prescribing which led
7 to more distribution over the years. And then we've seen a
8 decline if we go back to around -- and, again, when I'm
9 looking at data, some of it is AmerisourceBergen data.
10 Other is data that I'm seeing whether it's published by CDC
11 in terms of prescribing rates and that sort of thing.
12 Right? So then we saw -- we've seen and we continue to see
13 a decline in the prescribing of opioids.

14 And, and, so -- which is a good thing in my view. And,
15 so, when I say that -- let me just stop there for one
16 second. The prescribing of those opioids and the increase
17 in the distribution and the subsequent decline in the
18 prescribing and the decline in the distribution are, are
19 directly related. Right? And it shows us that where the
20 demand came from.

21 And, so, I would say that certainly the
22 over-prescribing of opioids over time has contributed
23 significantly to the epidemic.

24 **Q.** So in that sense, do you believe that when the
25 prescribing levels are increased, it also puts the, an

1 increase in diversion of pills into the illicit market as
2 well?

3 MR. HESTER: Object to form.

4 THE COURT: Tell me what your basis is for the
5 objection, Mr. Hester.

6 MR. HESTER: I think it's compound, Your Honor.

7 THE COURT: Yeah. I'll sustain the objection.

8 BY MR. PIFKO:

9 Q. Mr. May, you, you just testified that you believed
10 there was an increase in prescribing of opioids over
11 time; correct?

12 A. Correct, and then a subsequent decrease, correct.
13 Thank you.

14 Q. So my question is coming from the framework that
15 there's an increase in prescriptions being written of
16 opioids, that's putting more pills out in the world. And do
17 you believe that there is a corresponding increase in
18 diversion that accompanies the increase in prescribing?

19 MR. HESTER: Objection, Your Honor, compound
20 again.

21 MS. MCCLURE: Join.

22 MR. RUBY: We join in that, Your Honor. And we'll
23 continue to object to the attempt to elicit opinion
24 testimony from this witness who was not disclosed as either
25 an expert on a hybrid witness.

1 THE COURT: Well, it's not an expert -- it's a lay
2 opinion, isn't it, Mr. Pifko?

3 MR. PIFKO: Well, he's the -- yeah. I'm not
4 asking him as an expert, but he is the head of diversion
5 control for AmerisourceBergen and he has a 30-year --

6 THE COURT: Well, based on his experience, I'll
7 let him answer.

8 THE WITNESS: I'm sorry to make you ask me that
9 question one more time.

10 BY MR. PIFKO:

11 **Q.** Yeah. I'm asking if you believe there's a
12 corresponding increase in diversion of prescription
13 opioids that accompanies the increase in prescribing of
14 opioids.

15 **A.** So the, the -- I cannot say as I sit here today that
16 the elevated prescribing of opioids in, in the -- that there
17 is a correlation between the pharmaceutical supply of
18 opioids, big or small, how that's contributed to the illegal
19 market.

20 We have no visibility, of course, in terms of -- we
21 have -- we deliver pharmaceuticals, opioids and other
22 controlled every single day to a pharmacy, and then those
23 are dispensed. We have no, zero visibility from the moment
24 that we actually -- the, the controlled substances leave our
25 distribution center on that last mile vehicle and go to the

1 pharmacy.

2 We, we just -- we don't have visibility and we haven't
3 sought to somehow track that. I haven't, you know, tried to
4 understand that and I don't know that I could if I did.

5 BY MR. PIFKO:

6 **Q.** Okay. So based on the context you described, do
7 you believe the volume of prescription opioids diverted
8 into the illicit market was a substantial factor giving
9 rise to the opioid epidemic?

10 MS. MCCLURE: Same objection, Your Honor.

11 THE COURT: Well, he said he didn't know anything,
12 if I understood him correctly, about, about the volume of
13 opioids diverted into the illicit market. He didn't say
14 anything about that, did he?

15 MS. MCCLURE: Your Honor, I agree. He said, "I
16 cannot say there's any correlation."

17 THE COURT: Objection sustained.

18 BY MR. PIFKO:

19 **Q.** Mr. May, have you reviewed the House Energy and
20 Commerce report called "Red Flags and Warning Signs
21 Ignored: Opioid Distribution and Enforcement Concerns
22 in West Virginia"?

23 MR. RUBY: Your Honor, we'll object in that this
24 is the subject of -- House Energy and Commerce report is the
25 subject of a pending motion that the Court has yet to

1 decide.

2 MS. MCCLURE: Join, Your Honor.

3 MR. PIFKO: I'm just asking if he read it, Your
4 Honor.

5 THE COURT: I'll let you pursue this for a while.
6 You asked him if he had reviewed the House Energy and
7 Commerce report.

8 Have you?

9 THE WITNESS: I have not. I have heard of
10 certainly news and seen news clips about -- if we're talking
11 about the same report. I'm not even sure because I heard
12 the end of that was for West Virginia. But if it's all in
13 the same report, I certainly remember seeing news reports,
14 clips. But beyond that, I don't recall ever reading that
15 report.

16 BY MR. PIFKO:

17 **Q.** Have you reviewed the --

18 MS. MCCLURE: Your Honor, so we would, we would
19 request that Mr. May not be asked questions regarding the
20 report he hasn't read.

21 BY MR. PIFKO:

22 **Q.** Have you reviewed the 2019 Office of Inspector
23 General report that was entered into evidence by your
24 counsel? Are you familiar with that report?

25 **A.** I am familiar with excerpts from that report. I've,

1 I've read certain parts of that report. I can't say as I
2 sit here that I've read it from end to end.

3 **Q.** Did you have an understanding -- what's your
4 recollection of the portions that you read?

5 **A.** Of the Inspector General's report?

6 **Q.** Yes.

7 **A.** I seem to recall there was some critiquing of the
8 handling of suspicious order reports by DEA. But beyond
9 that, I really don't have a lot of clear recollection. I'm
10 not even sure when I looked at the excerpts.

11 **Q.** Do you recall reading any portions in the report that
12 were about the opioid epidemic in general?

13 **A.** I may have read sections. I just don't recall what
14 those may have been. I, I try to take in a lot of material
15 in my position and, and read as much as I can as I conduct
16 my work, but I just don't have a specific recollection.

17 **MR. PIFKO:** Your Honor, I don't have any further
18 questions at this time and pass the witness.

19 **THE COURT:** All right. Is there any cross?

20 **MS. MCCLURE:** Yes, Your Honor, there will be
21 cross-examination of Mr. May.

22 That said, I do believe that Mr. Pifko has covered some
23 fairly extensive portions of the examination that we would
24 have with Mr. May. So if we were going a full day today,
25 this would be the time where I would request that I have,

1 you know, 15 or 20 minutes to evaluate the outline and
2 determine whether we can shorten. But that said, with the
3 fact that we have a noon deadline, I would request at least
4 a ten-minute break to review that.

5 THE COURT: How much cross-examination of this
6 witness do you expect to have?

7 MS. MCCLURE: I expect it to be something around
8 an hour to an hour and a half given that we've covered some
9 of the things that I was going to cover, so I want to
10 shorten --

11 THE COURT: Well, we're going to have to have him
12 come back it looks to me like.

13 Mr. May, I know you'd probably like to get out of here,
14 but we're going to ask you to come back Monday morning, sir.

15 THE WITNESS: I'm happy to do so.

16 THE COURT: All right. Thank you very much.

17 Let's go ahead and pull the plug on this now then
18 unless one of the other defendants wants to use 20 minutes
19 here.

20 MR. RUBY: No, Your Honor.

21 MR. HESTER: No, Your Honor.

22 THE COURT: Okay. Let's -- we'll come back at
23 9:00 Monday morning.

24 We'll see you then, Mr. May.

25 THE WITNESS: Yes, sir. Thank you.

1 THE COURT: Yes, Mr. Farrell.

2 MR. FARRELL: I think this is the time that
3 plaintiffs are formally proffering and tendering the
4 deposition transcripts for purposes of trial testimony of
5 Nate Hartle and Thomas Prevoznik. I think those are the
6 magic words that I say to start the argument with the other
7 side.

8 THE COURT: All right. There is a motion to
9 strike Mr. Prevoznik's testimony, --

10 MR. FARRELL: Yes.

11 THE COURT: -- is there not?

12 MR. HESTER: And there's a pending motion as to
13 the Hartle deposition as well, Your Honor.

14 THE COURT: I don't remember that. Is that to
15 strike the whole thing or just --

16 MR. HESTER: Yes, Your Honor. Well, yes,
17 objecting on various grounds to that testimony. So we've
18 briefed that for you.

19 THE COURT: All right. Well, I'll try to look at
20 those issues.

21 And you'll be ready to go on Monday morning, Mr.
22 Farrell?

23 MR. FARRELL: Yes, Your Honor.

24 THE COURT: Okay, all right. I'll see everybody
25 Monday.

1 Is there anything else to take up now?

2 MR. MAJESTRO: Your Honor, with respect to the
3 Prevoznik motion, that is not fully briefed and we will be
4 in a position to file our response tomorrow.

5 THE COURT: Okay. I'll be happy to read that.

6 MR. MAJESTRO: I would expect my friends on the
7 other side have a reply.

8 THE COURT: Okay, all right. Very good. See you
9 on Monday.

10 (Trial recessed at 11:38 a.m.)

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1 CERTIFICATION:

2 I, Ayme A. Cochran, Official Court
3 Reporter, and I, Lisa A. Cook, Official Court Reporter,
4 certify that the foregoing is a correct transcript from
5 the record of proceedings in the matter of The City of
6 Huntington, et al., Plaintiffs vs. AmerisourceBergen
7 Drug Corporation, et al., Defendants, Civil Action No.
8 3:17-cv-01362 and Civil Action No. 3:17-cv-01665, as
9 reported on May 14, 2021.

10
11 S\Ayme A. Cochran

12 Reporter

13 s\Lisa A. Cook

14 Reporter

15 —

16 May 14, 202117 Date
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